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The Massachusetts Zoning Appeals Law: Lessons of the First Three Years.

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THE MASSACHUSETTS ZONING APPEALS LAW:

LESSONS OF THE FIRST THREE YEARS

Submitted for Presentation at Confer-In 72

Boston Oct 7-11 1972

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August 1972

THE MASSACHUSETTS ZONING APPEALS LAW: LESSONS OF THE FIRST THREE YEARS

SUMMARY

The precedents that are now being resolved in Massachusetts in the first cases before the State Housing Appeals Committee under Chapter 774 of the Acts of 1969 may become the foundations of a new expression of regional and state interests in control of private land uses, over-riding municipal interests for selected public purposes such as housing for low and moderate income people. While State authorities previously have been able to veto land developments that would have been permitted by local authorities, this is the first State agency empowered to require acceptance of a land development over an official local denial.

Other states that may wish to build into their state legislation such an appeal process from local land use decisions for any public purpose, not just housing, are provided a comprehensive format in the partially completed drafts of "A Model Land Development Code" that have been published by the American Law Institute. The drafters of the model code appear to have reached a better resolution of the five major issues that have surfaced in carrying out these procedures in Massachusetts.

Applications for comprehensive permits for housing are being received at a steadily increasing rate from housing authorities and non-profit or limited dividend sponsors, even though the only two permit approvals by the state to date are still tied up in court appeals. Of the first twenty-three decisions by local boards, five were approvals that required no involvement of the State Appeals Committee, and two of these projects are already under construction. Almost half the permit applications involve housing construction in small suburban towns, which control almost two thirds of the metropolitan lands in Massachusetts but are participating in only a small fraction of the current construction of subsidized housing.

The five major issues analyzed are:

-Zoning Authority: can it be granted to an appointed committee?
-Planning Costs: how can the developer afford to prepare detailed plans before he even has his zoning?
-The Hearing Record: how much time should the State Committee devote to building records that will stand up in court?
-State Responsibility for What Gets Built: how much interest should the State maintain in the subsequent construction?
-Meeting Total Housing Needs: can a statewide housing program be built upon this adjudicatory permit process?

The zoning authority issue must be resolved by the court. Ad hoc resolutions are being reached separately for the other four issues as individual cases move through the comprehensive permit process. Experience and familiarity with the process are improving at the local level with the increasing frequency of applications for comprehensive permits, which should allow better resolutions of these issues to evolve. The results will be valuable precedents wherever a role for state government is being designed in special permits for land development.

Background

In the rocky ground of local government in New England, some re-assertions of fundamental state interests in the decisions that control certain private land development are beginning to take hold. Unique among these is an act of the 1969 session of the Massachusetts legislature establishing a wholly new permit process for housing for low and moderate income people, which has come to be known locally as the "anti-snob zoning law," and in some of the national publications as the "Massachusetts Zoning Appeals Law."[1] A more accurate short title might be the "Massachusetts special housing permit law," because it embraces not only the zoning approval but all other aspects of a building permit such as building code approval and public health approval as well. What you call it depends largely upon what you are using it for as a precedent. In this paper it is considered as a precedent for a wholly new role for state governments in land use regulation.

The re-assertions of state interests in New England are occurring in the midst of traditions of autonomy of local government that are as strong as anywhere in the world. The communities of the original settlers governed the lives of their individual members to a degree that few of us would tolerate today, through institutions such as the open town meeting, which still serves as the legislative body for over three-fourths of the 351 municipalities which presently blanket Massachusetts. Government by citizens' committees has managed to survive where growth has been slow and the demands for public services not too urgent--which applies to most of New England. Winning approval of a new subdivision and building design, for example, can involve a developer in presentations to evening meetings of the planning board, the board of health, a part-time building inspector, and sometimes the zoning board of appeals or the board of selectmen, the latter serving as the municipal chief executive authority, at least in between the sessions of the town meeting, which are traditionally annual affairs.

New England has done well by its town governments in many respects. They have been particularly effective in assuring that unwanted changes are stopped. A stable, small-town character has been preserved in most parts of the region, and this has become a precious commodity for a region that has such difficulty competing with other parts of the country for new basic economic activity. Such a governmental setting may also allow the interests of environmental protection to succeed, the latter being largely aimed at stopping unwanted alterations of natural surroundings.

However, the interests of people of low or moderate income seeking a place to live closer to suburban job opportunities are seldom served at all by this type of town government. They run head-on into the traditional American family's desire for stability of the home neighborhood and property values, which has become almost an unwritten article of the bill of rights. (It was the Massachusetts constitution, by the way, which provided the model for what later become the first ten amendments to the Federal constitution.) Resistance to change of one's home environment can run so deep as to eclipse the ethical and political concerns over what eventually will happen when a large segment of our population is denied access to homes outside of a limited central portion of a metropolitan area, denied because of its need for a different kind of housing unit, perhaps for more transient living, usually with lower rent, and often with some form of public subsidy. How and where to respond to their demands has become one of the hottest political issues of the 1970's, and notorious examples of what can happen have been provided in Black Jack, Missouri, and

in Forest Hills, New York. We may be making some headway toward becoming an "open society" in our places of work and our places of education, but the opening of our home neighborhoods is proving to be far more difficult.

In 1969 an unusual coalition of frustrated land developers, law reform interests and city politicians was able to frame a response to the issues of exclusionary zoning that has set a precedent for what may become the most effective and permanent mechanism to redress this imbalance. Their petition to the legislature was edited, expanded, amended, and compromised, many times over, but finally passed by the barest of majorities to become Chapter 774 of the Acts of 1969, referred to in this paper as the Massachusetts Zoning Appeals Law. Its passage is a worthwhile story in itself, but has already been well told, and will not be repeated here.[2] It is all the more remarkable in that it was passed by a state legislature that is the second largest in the nation, with representative districts so small that town politics pervade, and that only in 1966 had cleared the way for the "Home Rule Amendment" to the state constitution, strengthening the powers of the municipal electorate.

The following is a review of what has been learned in the first three years of the administration of the Massachusetts Zoning Appeals Law for the benefit of those who seek to put its principles to work in other places, or for other, broader purposes. The review is organized around the five issues seen by the author as the most critical that are still unresolved in the design and administration of a program of this type:

1. Zoning Authority
2. Planning Costs
3. The Hearing Record
4. State Responsibility for What Gets Built
5. Meeting Total Housing Needs

Before taking up the issues, however, there is need of a brief exposition of the general approach of the zoning appeals process, and the structure it has been given in Massachusetts.

The State May Now Say, "Yes"!

To date only two housing projects have reached the construction stage under the Massachusetts Zoning Appeals Law, both of them through local approvals that did not test the state appeals process. The court tests of the first two appeals to the state will not be decided until the end of 1972. But the law has already set a precedent for a state permit process for private developments of regional benefit, which to our knowledge is unique in this nation. This approach contrasts sharply with the traditional governmental way of responding to abuse of delegated powers, by the addition of more state controls, which would not have alleviated this housing problem. State controls on top of local controls might suffice to protect the mountain environments of Vermont, or the wetlands of southern New England, but would be of no help to the housing developer whose project provides for a public need but is up against the obstacles of local codes.

As a legislative remedy to this conflict, the Zoning Appeals process has avoided many of the complexities and delays of judicial remedies that are sought through the courts. To challenge the legality of the zoning ordinance itself, as has been done in land mark cases in Pennsylvania[3] and California[4], requires the challenger to establish his standing to sue, and to prove that denial of individual rights through segregation has been the effect of the local ordinance. To succeed, the challenger must knock down the unwanted elements of the existing legal structure, one by one, and hope that the remnants of the legal structure will better serve his interests than the original structure with which he started. In contrast, Massachusetts has legalized a whole new permit process that does not challenge existing local codes, but simply bypasses them as insufficient grounds for denying certain specified types of housing developments considered to be of benefit to the greater region.

Municipal officials throughout the state sensed quickly that their exclusive powers over zoning had been breached, and their friends in the legislature would have buried the bill in 1969 had not the Governor and the leadership of both houses committed themselves to its passage. The Massachusetts Selectmen's Association continues to be the staunchest foe of this legislation, especially in the suburban county sections of the Association. One of the perennial petitions to the legislature to repeal this act, filed as House 1082 of 1972, was endorsed by a majority of those attending the 1971 statewide meeting of the Selectmen's Association. The repeal attempt failed again this year, but by a smaller gap than similar petitions last year.

The sponsors of the Massachusetts Zoning Appeals Law had hoped that simply the threat that permits might be issued for subsidized housing at unpredicatble locations would spur municipal officials to schedule their own construction programs to meet the modest quotas of the law in a manner more to their liking. The creation of a new, higher density residential category limited to subsidized housing in the Lexington zoning ordinance in the spring of 1970 lent some encouragement to this hope.[5] But no other towns or cities have followed suit, and in Lexington it remains a "floating zone," a category not yet applied to any specific land. The one application that succeeded in passing the Lexington town meeting in 1971 was put before all of the voters of the town shortly thereafter by a referendum petition, and voted down.

There remains little hope that state-level promotions or threats against exclusionary zoning will change the local ordinances. Any results beyond a token quantity of new housing will depend upon execution by the state Housing Appeals Committee of its permit granting powers. The actual mechanisms through which they are granted, and the distortions they may create in the physical end results, are crucial to those who would plan for the "open society." Eventually there may be some impact on the local zoning ordinances themselves, but it will depend upon a weighing of interests against a state housing permit mechanism that is generating actual housing construction and not just plans and appeals.

Meanwhile, there is evidence that a breakthrough in official local acceptance of subsidized housing could occur outside the zoning codes in Massachusetts through approvals of comprehensive permits by the local boards of appeals, which are the first agencies to act on each application under the new Massachusetts law. Five of the first twenty-three such actions of which we are aware were in fact approvals, although two

of them are currently tied up in court appeals. It is significant that the three successful local approvals are all for elderly housing. The drafters of the law had actually hoped for a much higher proportion of local approvals, which may begin to occur if and when the court upholds the law in the current appeals.

The members of the Housing Appeals Committee already have sensed a gradual acceptance of the housing appeals procedures among the municipal officials with whom they deal, according to Maurice Corman, who has been the presiding hearings officer for all but the first two appeals, starting in August, 1971, and has drafted the first two decisions of the Committee. Mr. Corman suggests that the early hostility of municipal officials to the very existence of the zoning appeals law has subsided as they see that the procedures of the Committee are open and even-handed, do not represent any state effort to "railroad" through new housing projects, and in the initial cases at least have involved projects that will benefit primarily the present low-income residents of the suburbs where they are to be built.[6]

Drafts of a model land development code that would be a vehicle for any state to establish state-granted permits, not just for housing of low or moderate income people but for any development considered to be of state or regional benefit, have been published and circulated in 1971 by the American Law Institute.[7] Tentative Drafts No. 2, 3 and 4 of this model land development code, published by the Institute in three successive Aprils, 1970, 1971 and 1972, together establish the basic patterns of what hopefully will become the successor to the Standard State Zoning Enabling Act and the Standard City Planning Enabling Act, promulgated by the U.S. Department of Commerce in 1922 and 1928, respectively. Article 7 of this model code, in Tentative Draft No. 3, provides for the critical definitions of "Development of State or Regional Benefit," in Part 3, and for the appeals that may be made to a "State Land Adjudicatory Board" when such developments are denied a permit locally, in Part 7.

The proposals of the American Law Institute would obviously reach far beyond the types of housing projects that may be permitted under the Massachusetts Zoning Appeals Law. But the same critical issues that have arisen in operating the permit and appeals mechanisms in Massachusetts must also be resolved in any state that wishes to undertake the broader permit program of the model land development code. Furthermore, the drafters of the model code, having been able to observe in early 1970 some of the pitfalls of the Massachusetts permit process as presently structured, have already made provisions for coping with many of them.[8] As each issue is taken up later in this paper, it will be seen that many of the key concepts of the special permit and the state appeals proposals in the model land development code are already being put to a test in Massachusetts.

The Elements of a Comprehensive Permit

The Massachusetts Zoning Appeals Law inserted four new sections, numbers 20 through 23, in the regional planning enabling legislation of Massachusetts, Chapter 40B of the General Laws. The full text is reproduced as Appendix A to this paper. The definitions of terms in Section 20 identify the public purpose of the comprehensive permit as that of the federal or state programs which have been established to assist the construction of low or moderate income housing. Development for private

profit-making purposes is excluded by allowing only public or non-profit or limited dividend organizations to apply. The public purpose provides an important strength to this form of challenge to exclusionary zoning which often has not been present in court challenges of existing zoning ordinances; some of the attacks on legality of zoning in Pennsylvania, for example, have been by developers of luxury housing.[9]

Section 21 empowers the local zoning board of appeals in each city and town to grant comprehensive permits, conferring upon it for this type of housing development "...the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application...." It is only after denial of a permit by the local board that a developer may appeal to the state Housing Appeals Committee, under the provisions of Section 22. The model land development code of the American Law Institute also follows this pattern, with provisions for appealing the denial of a special development permit by the local agency under Article 2 to the State Land Adjudicatory Board under Article 7.

The sponsors of the Massachusetts act had also hoped to eliminate any chances of having several reluctant local boards give a developer the "run-around" among them, by concentrating all facets of the development approval in a single decision. However, if this concept were actually to be followed in practice, it would place a considerable burden on the developer to prepare complete plans from the outset, an issue which will be considered later in this paper.

Section 22 of the Zoning Appeals Law establishes the procedures and particularly the time limits for appeals to the Housing Appeals Committee, and for hearings and decisions by the Committee. Time limits are also established in Section 21 for each step in the local processing of a comprehensive permit application. Recognizing that the time required for processing of permits is costly to a developer, the time limits are fairly tight for any one party to dispatch any of the singular responsibilities it may have, ranging from "forthwith" for notices to be dispatched the Committee's state staff to forty days for decisions to be reached by the local zoning board of appeals. Nevertheless, if each governmental agency used its full time allowance, and the developer used only half of his, 130 days would elapse between the initial local application and the decision by the Housing Appeals Committee, plus the time required for conduct of hearings. The latter involves all of the parties together, and they may agree to any number of continuances of the hearing itself in order to complete the necessary record. Local hearings may be concluded in one night, or may continue for three weeks or more. However, for hearings of the Committee, which have involved the completion of a mutually-agreed record, the experience of the two completed cases has been that an average of 8 days passed before all testimony was presented; an additional 60 days passed before the transcript was typed, edited, and agreed upon; and another 20 days before final written argument was submitted by both parties. The 130 days stretches to perhaps 230, assuming there are no special hang-ups. However, the hearing for the appeal from Newton, where the opponents are admittedly using purposeful delaying tactics, has involved successive continuances for more than a year, starting in July of 1971, with no end in sight.

Section 23 of the Zoning Appeals Law establishes the grounds upon which the State Housing Appeals Committee may reverse the denial of a comprehensive permit by a local board, and in effect puts the local board on notice as to the limited grounds upon which it may expect a denial to be upheld. These grounds involve balancing the regional need for low or moderate income housing with the number of low income people already in the

town, protection of health or safety, promotion of better site and building design, or preservation of open spaces, "Regional need" is not defined by the act, but the procedural rules subsequently issued by the Department of Community Affairs define it as the shortage of such housing in the entire metropolitan area of which the city or town is part.[10]

The grounds for denial of a comprehensive permit also include an explicit quota or ceiling beyond which the Housing Appeals Committee may no longer require a city or town to permit additional subsidized housing. The quota is proportionate to the size of the city or town: either one-and-one-half percent of its land area, or ten percent of its existing dwelling units, whichever is met first. A quota is also established for the rate of annual development which may be expected: three-tenths of one percent of the land area of a city or town, or ten acres, whichever is larger. These numbers are quite arbitrary, and they are quite low in relation to total statewide housing needs. Yet only four cities and towns presently exceed their quotas and are thus immune to further issuance of comprehensive permits by the state.[11]

It is doubtful that the law would ever have been enacted without these absolute quotas set at modest levels. The fear that the first few suburban communities to permit higher density housing for low and moderate income people will become overwhelmed by far more than their share of the regional development is a real one, as can be seen in metropolitan development patterns throughout the country. Eventually, the statements of regional need and the "fair share" quota for each community should be part of the regional housing plan, endorsed by the state housing and land planning agencies. Lacking such a plan, an arbitrary percentage may be the only way to establish a "fair share" quota.

It is significant that the grounds for denial of a permit do not include the capacity of the city or town to provide for the public services or facilities to support the development. Housing for low or moderate income families brings with it a larger than average demand for services such as schools, recreation, social services and police, although this is less true of housing developments for the elderly. Furthermore, such developments normally do not pay full taxes in Massachusetts, with the tax reduction being considered the local contribution to the housing subsidy program. The drafters of the law relied upon the "fair share" quotas to bring about a more even distribution of these costs among local governments throughout the state, and purposefully avoided any special considerations for the current increases in these costs for cities and towns that are only now beginning to share in housing programs that have long been a burden of the central cities.

Housing Appeals Activity to Date

The number of appeals to the State Housing Appeals Committee has roughly doubled each year since the law became effective at the end of 1969. Only three appeals were received in 1970, but there were eight in 1971, and another eight in the first six months of 1972, bringing the total as of June 30, 1972, to nineteen.

A more complete measure of activity would be the number of applications received by local zoning boards of appeals, but unfortunately no effective provisions were made for guaranteeing that all of them are

reported to the state. From the informal reports received by the Department of Community Affairs, it appears that a total of thirty-five applications have been filed locally, of which five resulted in permits to build, eighteen were denied and subsequently appealed, and twelve are still awaiting a decision. The five permits granted locally are cases worth studying in their own rights. Although two of them are currently stalled by court appeals, the other three are resulting in the first new housing construction under the Zoning Appeals Law of 48 units in Dennis, 116 units in Woburn, and 200 units in Weymouth, all for the elderly.

Of the nineteen cases appealed, fourteen are still active, the other five having been withdrawn or not pursued by the developers. Decisions have been rendered by the Housing Appeals Committee on only two of them, in both cases reversing the local denial and ordering issuance of permits, for 88 units of housing for the elderly in Hanover and 60 units of family housing in Concord. Committee hearings are still in progress for eight cases, three of them awaiting only the submission of final written arguments by the parties to mark the official conclusion of the hearing. Four of the hearings are not active at present, having been temporarily suspended for the developers to resolve certain technical problems with their cases.

Issuance of permits in both Hanover and Concord has been stalled by appeals to the State Superior Court by each of the towns, which were fully expected. The Superior Court has not attempted to hear either case but has reported both of them directly to the Supreme Judicial Court of the State. The "SJC" will be making its findings on the basis of the record established by the Housing Appeals Committee, and will not be opening up the cases for further evidence, but rather will be resolving the points of law that are now in contention among the parties. Perhaps the pivotal point is the issue of authority to bypass local zoning, which is taken up as the first of the several issues to be discussed below. A full review of the legal issues involved in this and the several other points in contention is beyond the scope of this paper. Their resolution by the court, expected around the end of 1972, will be a turning point for the state housing permit process. If the Housing Appeals Committee is upheld, more and more applications for permits can be expected, testing the administrative machinery of the process to its limits, these limits being the main concern of this paper. However, if any of the major points of the law are found to be in conflict with the State constitution, any correction of the flaws through new legislation will be a long and torturous process.

Table I shows the types of cities and towns in which housing would be built if permits were issued in the fourteen cases now actively in the appeals process. A total of nineteen projects would result, since one appeal, from Newton, involves a package of six projects. Their locations, along with the five permits issued locally, are shown on the accompanying map of "Active Comprehensive Permit Applications".

TABLE 1

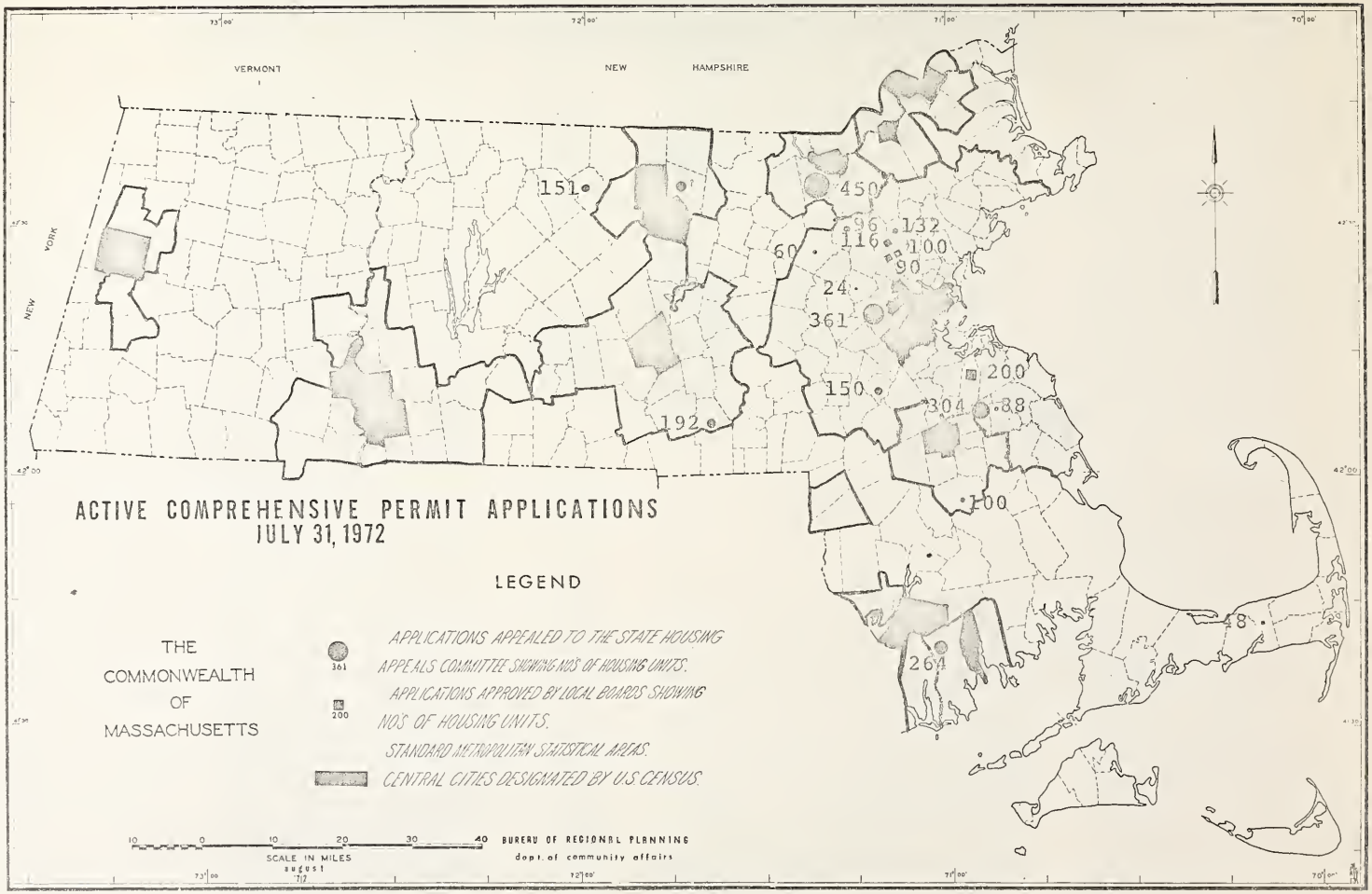
TYPES OF CITIES AND TOWNS FROM WHICH DEVELOPERS HAVE APPEALED FOR COMPREHENSIVE PERMITS, COMPARED WITH THOSE HAVING MHFA PROJECTS, CLOSED VERSUS COMMITTED, AS OF JUNE 30, 1972

Chapter 774 Projects Active as of June 30, 1972:	Within Metro Areas (SMSA)			Outside Metro Areas (SMSA)		
	Projects	Units	Avg. Size	Projects	Units	Avg. Size
Small towns, under 20,000	8	1,304*	163	0	0	0
Large towns and cities	10**	1,117	112	1	151	151
Central cities of Metro areas	0	0	0	x	x	x
TOTAL	18	2,421	135	1	151	151
All Projects with MHFA Financing Closed, Jan. 7, 1970 through June 30, 1972:						
Small towns, under 20,000	2	360	180	7	1,285	184
Large towns and cities	10	1,466	147	4	500	125
Central cities of Metro areas	45	5,415	120	x	x	x
TOTAL	57	7,241	127	11	1,785	162
All Projects with MHFA Financing Committed, Pending Financial Contracts as of June 30, 1972:						
Small towns, under 20,000	5	814	163	11	1,414	128
Large towns and cities	17	3,887	230	1	300	300
Central cities of Metro areas	28	3,798	136	x	x	x
TOTAL	50	8,499	171	12	1,714	143

*Includes a rough estimate of 200 for Lunenburg project now being re-designed.

**Counts Newton development as 6 projects.

Corrected Map preceeding page 8, Confer-In #100
9/12/72



For comparison, the second and third sections of the table show a similar array for the sixty-eight projects that have received mortgage assistance contracts from the Massachusetts Housing Finance Agency ("MHFA"), many of these already completed and occupied, and also for the sixty-two projects for which MHFA has informally committed its financing, as of June 30, 1972. The comparison is relevant because, of the sixteen projects by private developers who have so far indicated their financing plans, all but two are listed as MHFA developments, as shown in Appendix B. The financing of most of the developers seeking comprehensive permits is still very tentative, however, and only one of them (from Concord) is listed by the MHFA as committed.

Table I shows that practically all of the active applications for comprehensive permits have come from the metropolitan suburbs, both large and small, to a degree that is not reflected in the overall MHFA Program. Only one of the nineteen project applications has come from outside one of the nine standard metropolitan statistical areas in Massachusetts, in contrast to about one-quarter to one-fifth of all MHFA projects located in such areas. Comprehensive permit applications within metropolitan areas are about evenly split between smaller suburban towns (under 20,000 population) and the larger uburban towns and cities, with none located in the central cities of the metropolitan areas. In contrast, housing construction in metropolitan areas financed to date by MHFA has been predominantly located in the central cities. Only one-third of the total units financed are outside the central cities, and of that one-third, less than a fourth are in the smaller suburban towns. Among the MHFA "committed" projects, i.e., not yet under construction, the majority of units has shifted to the suburbs (but not the total number of projects), while the proportion in the smaller towns remains as low as before.

The locational pattern of the five developments approved locally is somewhat closer to the MHFA pattern, four of them being in a city and two towns over 20,000 population that are suburbs of Boston, and one in a small, non-metropolitan town.

The Massachusetts Housing Finance Agency has been the State's most important vehicle for construction of housing for low and moderate income families. The figures in Table 1 suggests that the MHFA program has not yet made much progress in the smaller metropolitan suburbs. These figures also suggest that permits issued through the Housing Appeals Committee could begin to open up more sites in these smaller towns. Just how important this will be to the State housing program can be seen in Table 2, showing how the land area of the state is divided among the six types of cities and towns listed in Table 1. The small towns contain over three-fifths of the total metropolitan lands in Massachusetts, and their share of the open land not yet committed to other permanent uses is obviously far higher, although comparable figures for metropolitan land use throughout the state are not available.

TABLE 2

SHARE OF THE TOTAL LAND AREA OF MASSACHUSETTS WHICH FALLS IN EACH TYPE OF CITY AND TOWN (in square miles)

	Within Metro Areas (SMSA)	Outside Metro Areas (SMSA)	Total
Small towns, under 20,000	1,942	4,617	6,559
Large towns and cities	709	184	893
Central cities of Metro areas	387	-	387
TOTAL	3,038	4,801	7,839

ISSUE NO. 1: Zoning Authority

The question of whether the legislature may delegate to an appointed committee the authority to bypass a zoning ordinance enacted by an elected local governing body has been a major point in the opposition of the towns to both of the first two appeals to be decided, from Hanover and from Concord. Both of the written decisions of the Housing Appeals Committee cite the following language from a 1951 court decision in Massachusetts: [12]

> "The power of the General Court (i.e., legislature) over the subject of zoning is supreme.... When it has spoken to any branch of that subject, conflicting by-laws or ordinances established by local authority must give way."

However, both decisions have been appealed by the towns and now await decisions by the Supreme Judicial Court, as described above, and it remains to be seen whether the legislature has exceeded its constitutional authority in the Zoning Appeals Law.

The towns are also challenging whether the legislature did, in fact, delegate this authority to both the Housing Appeals Committee and the local zoning boards of appeals in the language that was enacted in 1969. This is one of many respects in which the law as passed in Massachusetts is no model act, for the language is ambiguous on this point, at best. The Housing Appeals Committee drafted a carefully reasoned argument in both the Hanover and the Concord decisions to the effect that the intent of the legislature could not have been otherwise.

The model land development code drafted by the American Law Institute is much more explicit in requiring the local board to bypass the local "development ordinance," which is a streamlined combination of zoning and subdivision control, for developments of regional or state benefit. The following language is from Article 7, Section 7-303: [13]

> "A (local) Land Development Agency shall grant special development permission for development of state or regional benefit which meets the criteria ... whether or not the development is authorized by the (local) development ordinance."

Such language is certainly to be recommended for any state that is considering this type of legislation.

ISSUE NO. 2: Planning Costs

A developer who applies for a comprehensive permit in Massachusetts must be prepared to defend all of the aspects of his project that are normally regulated by the town -- subdivision, site plan, drainage, utilities, building construction, etc. -- at the single hearing before the zoning board of appeals. This denies him the traditional approach of first obtaining simply control of the land and the desired zoning, based on generalized preliminary plans that are not too expensive, after which, if successful, he has the collateral for financing the more expensive engineering and architectural work to satisfy the other, more detailed development requirements. This has become such common practice that developers have claimed that the normal lending institutions are refusing to finance their engineering and architectural costs until they have obtained the necessary zoning for the site, whether through the Zoning Appeals process or otherwise.

The initial response by developers has been to prepare semi-detailed plans to whatever degree of refinement they could afford, and expect that conditions be attached to the permit regarding satisfaction of the other, more detailed requirements such as the building code before actual construction may proceed. The Housing Appeals Committee has responded in its first two decisions simply by citing the usual codes and technical agencies for any subjects not covered by plans already submitted to it, for example, the town building code as enforced by the town building inspector, or the state sanitary code as enforced by the State Department of Public Health, to be satisfied as conditions to the comprehensive permits. Thus have the forces of the development process caused these approvals to become separated again, in the face of a law that specifies a single approval of a comprehensive permit! The Committee has maintained an umbrella of state interest in the manner in which the building and sanitary codes are enforced, however, by including as a final condition to each comprehensive permit that:

> "Should disagreement between the builder and local officials arise, certification by the Department of Community Affairs, if requested, shall be adequate proof of compliance with any requirement under the comprehensive permit, or any of the other terms of this order."

The issue is whether regional and state interests are really served by including any of the other local approvals beyond zoning and subdivision control in the comprehensive permit, considering that the developer's submission will probably be incomplete in the other areas anyway, and these matters will probably be bucked right back to the individual local board or inspector in any case as conditions attached to the permit. The present, comprehensive arrangement does give the developer the eventual recourse of a second appeal to the Department of Community Affairs should he feel that obstacles are being thrown in his path by the building inspector or other local officials. However, the second appeal could also be provided for by law as a separate recourse from local denial of a building or health permit for this type of development.

Most of the other aspects of land development beyond zoning and subdivision control have already seen substantial state involvement in setting of standards and supervision of their enforcement, at least in Massachusetts. The sanitary code is already a single, mandatory, statewide document, and the building code will become so on January 1, 1974,

under legislation passed in July, 1972. Application and enforcement of the building code will still be the responsibility of local inspectors, but they will have to be qualified for their jobs by the state. Eventually, the appeal from a denial of a health or building permit for this type of development may be an inter-agency affair at the state level.

The model land development code of the American Law Institute would combine zoning and subdivision control into a single "development ordinance" to be administered by a local "land development agency", and would leave to the discretion of the local government the possible centralization in that agency of approvals under the building, health, or other codes as well. The language of the model code encourages this centralization of administration, in Part 3 of Article 2, but apparently would leave a building permit as a separate approval distinct from that of a development permit.[14] Thus, under the proposed model code it is only the denial of a special development permit, covering what is traditionally zoning and subdivision control, that may be appealed to the State Land Adjudicatory Board when state or regional interests are involved. Experience in Massachusetts would suggest this is the most reasonable scope for a special permit. The model code does not confront the possibility of exclusionary building codes or health codes.

Given the comprehensive permit arrangement in Massachusetts, it is also possible to provide special "front-end" money for developers to prepare all of the detailed plans required. Non-profit sponsors of housing projects are in a better position to raise donations for this purpose, including donations of time of community leaders, and such support can also be useful for presentations at hearings and in sustaining the developers over the extended period of applications and appeals. However, the "non-profits" have also found that an affiliation with a limited dividend developer is almost essential to realize the necessary efficiencies and scheduling for the actual processes of housing construction and maintenance.

Public "seed money" is available under the "106a" program of HUD, but to our knowledge there has been no use of it by those who are seeking comprehensive permits. A similar "Housing Development Fund" in each of the two state agencies that finance housing construction would have been created by Senate Bill No. 1434 of 1972, but failed to pass in the midst of the current overriding concern for austerity in state government.

ISSUE NO. 3: The Hearing Record

The Massachusetts Zoning Appeals Law specifies relatively loose procedures for conduct of hearings by local zoning boards of appeals, but rather tight restrictions for those of the Housing Appeals Committee. Procedures specified for local hearings are those of the normal processing of applications for variances before the zoning board of appeals, involving an informal "legislative hearing" where parties testify at the discretion of the presiding officer, where there is no assurance that cross-examination of witnesses will be permitted, and no transcript is required. As a result, the record of the local proceedings that reaches the Housing Appeals Committee is usually very incomplete, containing substantial amounts of hearsay, and seldom is adequate even for findings of fact. The Housing Appeals

Committee, on the other hand, is required to hold an adjudicatory type or "administrative hearing", building an accurate record that can if necessary be inspected by the courts on an appeal without need for further submissions of evidence or findings of fact. The Housing Appeals Committee has been able to meet these requirements only by holding the record wide open for consideration of any amount of evidence submitted by any legitimate party, and offering the opportunity for each document or new evidence or testimony to be challenged by opposing parties as it is filed in the record. The Committee is forced both to review the merits of the local decision and at the same time to establish a record that will not be challenged in the courts on points of fact.

The Housing Appeals Committee must also be prepared to deal with a record of local proceedings that is incomplete because a reluctant local board has denied the application precipitously with only a cursory hearing, on a point of law, for example. If the developer appeals, and the Housing Appeals Committee agrees with him that the local board was in error on that point of law, then the Committee may find that it must itself conduct the first real hearing on the merits of the application. Should the Committee choose instead to remand the appeal back to the local board for a proper hearing, as was actually done in the second appeal to reach the Committee, it takes two great risks. First, the developer may not be able to survive the additional time for another round of local applications and hearings, which apparently was the result in the above-mentioned case, from Billerica. Second, the expectation of such a response from the Committee is an incentive to superficial treatment of applications by local boards in general, who could then be confident that the application would end up back in their hands anyway, after further delays for the developer, even if the Housing Appeals Committee finds them in error.[15] The purposes of the Zoning Appeals Law are far better served if the Housing Appeals Committee proceeds to hear and decide on each appeal that has at least been the subject of a formal decision of the local board, even if the entire record must be built at the state level.

It is unfortunate that thorough and fair attention at the local level to each application for a comprehensive permit is discouraged by the present arrangements in Massachusetts, except in occasions where the local board is inclined to grant the permit in the first place. In contrast, the model land development code of the American Law Institute would require that a full-scale administrative hearing be given by the local "Land Development Agency" for any application for a special development permit, under the provisions of Article 2, Sections 2-201 and 2-304. If a denial were then appealed to the State Land Adjudicatory Board, the latter board would not be obliged to hear the case de novo but could examine it on the record, and reserve for itself the prerogative of granting oral argument, under the provisions of Article 7, Section 7-702. Opponents of a project would then be on notice that if they did not build an adequate record at the local hearing, they might never again have the opportunity. Perhaps the conduct of a full-scale administrative hearing is beyond the capacities of most local zoning boards of appeals, although technical assistance could be provided by the staff of a state agency if this were the only

problem. We may well have to wait for passage of the comprehensive kind of recodification of zoning and subdivision control enabling legislation that is embodied in the model code before expecting such thorough procedures by local boards in the smaller towns. Under the model code, they would at least operate as a single land development agency, with the resources of both the present planning boards and zoning boards of appeals. Meanwhile, individual local boards are more frequently taking it upon themselves to at least keep detailed notes on their proceedings, and the Housing Appeals Committee has seen a marked improvement in records submitted on appeal from certain local boards.

The advisability of the open, adjudicatory hearing procedure has been seriously questioned in regard to a case that has become the "albatross" of the Housing Appeals Committee, an appeal from Newton by a non-profit developer seeking to build 361 units in six separate projects. Abuttors of three of the sites, staunch opponents, have been accepted as parties in the hearing and have used every conceivable point of law and argument to complicate and draw out the hearing. The hearing opened on July 22, 1971, held its forty-second session on June 29, 1972, and no end is in sight. However, the same type of delaying tactics could be employed at whatever level a proper record of a case is to be established, whether before a local agency, a state appeals committee, or a court. Under the model land development code they could be expected to surface at the local level, and in fact the model code is rather generous in qualifying as parties to an application the owners of any land within 500 feet and also any bona-fide neighborhood organization whose boundaries include land within 500 feet of the proposed development pracel.

ISSUE NO. 4: State Responsibility for What Gets Built

The Massachusetts Zoning Appeals Law could be seen as a state program for getting housing built in localities that don't want it. The physical and social results in the first few projects to be built under the law will have high visibility. If the results do not meet at least accepted professional standards as good housing for low and moderate income people, the entire program may be in jeopardy. The Massachusetts legislature is fairly sensitive to local objections to state programs, and for example has repeatedly been unwilling to give any state agency the power to take and develop land for housing. Even the relatively friendly Urban Affairs Committee of the legislature became concerned during the 1972 session over the sizes of some of the projects for which comprehensive permits are being sought. When the perennial bill to clarify and improve the provisions of the Law reached that committee this year, the only change it made in the text was to insert rather tight limitations on the size of individual projects that could be built, related to the total population of the municipality.[16]

The reliability of the private developer to produce housing as good as is promised by his plans has already been called into question in some of the initial cases before the Housing Appeals Committee. In its first two decisions, the Committee has indicated that local enforcement officials will be responsible for assuring that the project meets the stipulations of the comprehensive permit, the local building code, and other relevant codes. In its first decision, the Committee also stipulated that the local board, in issuing the permit, could require a full disclosure of the terms of the lease by which the limited-dividend owner

of the future project is to pay for his land.

One would hope to see some more active state interest in the quality of what gets built under comprehensive permits ordered by the Housing Appeals Committee. But the reliability of the developers is not a concern of the Committee, according to the law, although the procedural rules issued by the Department of Community Affairs do not yet exclude this issue. The Committee itself can hardly be expected to take responsibility for this monitoring function, having difficulty at present in mustering enough funds even to pay for its transcripts.

The most effective control of the quality of what gets built will probably turn out to be through the public office providing the subsidy that qualifies the project as low or moderate income housing. Massachusetts is fortunate to have a well established and sensitive design review process in the Massachusetts Housing Finance Agency. Maintenance of their high standards will be crucial to the long-range success or even survival of the Zoning Appeals Law.

Enactment of the comprehensive changes proposed in the model land development code of the American Law Institute would have some advantages in this area. Under that proposed legislation, housing would be only one of a number of types of projects identified as being of regional or state benefit, and all cities and towns would be required to give applications for such developments full consideration at the local level. Any appeals from their denials of permits would be more like court proceedings, as described under the previous issue of hearing procedures, and administration of the permits if won by the developers would be clearly and fully a local responsibility.

ISSUE NO. 5: Meeting Total Housing Needs

The comprehensive housing permit process does not emerge from this analysis with much promise of becoming the vehicle for a broad state response to housing needs, estimated to require a minimum construction rate of 22,000 new housing units per year for people of low and moderate income.[17] Perhaps this process will prove necessary only in the smaller suburbs that are middle or upper income, but even that scale of appeals program would require many times the present level of activity of the Housing Appeals Committee. Can the appeals mechanism cope with such a rate of appeals, hearings and decisions? This is perhaps the fundamental question for national housing programs, which are presently being geared to the HUD policy of providing options for low income people to live throughout each metropolitan area.

The Housing Appeals Committee has been structured as an adjudicatory body, which ideally would mean that only in limited instances would a party be sufficiently aggrieved by the workings of the local permit process to appeal to the state. Actually, under present arrangements the developer is almost always sufficiently aggrieved to file an appeal, and the appeal process becomes the basic permit granting process, as described in preceding sections.

There is no reason why a five-member Appeals Committee could not handle in an expeditious manner the lion's share of projects in a broad suburban housing program, as long as the members are paid for their services, part-time, or even full-time if required, for example, for those who would preside at hearings. This is the model recommended by the American Law Institute for a State Land Adjudicatory Board, in Article 7 of its model code, Section 7-701, with the size of staff and amount of time of board members varying with the size of state and rate of appeals. The present Massachusetts arrangement, however, is a far cry from the model. No funds have yet been appropriated in any state budget to support more than the stenographic and travel costs of the Housing Committee. The high degree of professional expertise achieved to date in the deliberations and decisions of the Committee has resulted from the pragmatic response of the Department in assigning its own chief counsel to cover the additional tasks of legal counsel to the Committee and, subsequently, presiding hearings officer, without further salary.

A State housing program that even approached a response to total housing needs would require subsidies that reached far more than ten percent of the households of the entire state, and thus could quickly exhaust the "fair share" capacities of all of the suburbs under the quotas of the present Zoning Appeals Law. This is already happening in several of the larger cities through the established housing programs, without the use of comprehensive permits. An eventual increase in the quotas might be one manner of assuring continued effectiveness of this law, either a general increase of the quota statewide, or a selective increase only for those cities and towns targeted for a higher concentration of this type of housing in the regional housing plans that are yet to be drafted. Either type of increase would force a re-opening of what is already a sore issue to many legislators, and would be feasible only in the context of thorough and accepted housing plans, statewide, that had already caused large numbers of cities and towns to exceed the quotas at their current low levels.

The new housing allowance program being tested by HUD conceivably could bypass any relation to the quotas, and thus be operated outside of them, pouring millions of dollars into housing subsidies without counting as any contribution toward the "fair share" quota of a city or town. The unit that a household might occupy with a housing allowance does not appear to qualify as "low or moderate income housing" as defined by the Massachusetts Zoning Appeals Law. If such housing subsidies on the "demand side" of the housing market are in fact the wave of the future, and the means by which we may approach a response to total housing needs, then they will operate through market mechanisms far more direct and rapid than the zoning appeals process.

However there has been no indication that a successful, nationwide housing allowance system would replace the subsidized construction programs on the "supply side", which will continue to need the mechanism of zoning appeals. It might simply become the vehicle for most the the new subsidy monies, leaving the Zoning Appeals Law to churn along toward its social goals through the "supply side" housing construction programs for a longer period before bumping up against its statutory quotas.

The Zoning Appeals Law would better serve to promote a statewide housing program by a more careful structuring of the incentives for initiatives by local planning and housing agencies. For example, "corrective" amendments to the Zoning Appeals Law. sponsored by both the Department of Community Affairs and the Massachusetts Law Reform Institute would allow a city or town to qualify as meeting its quota simply by demonstrating that it has a plan that will do so within the five-year period that the law implies.[18] The proposed revisions would allow a local board to deny a permit to a developer who applied for a permit for a site outside the planned areas for low and moderate income housing.

Those cities and towns with a planning capacity might well respond to such provisions. At least this would recognize the importance of developing a five-year housing program in a way that the present law does not. Nevertheless, a very careful state review of any such plan offered as evidence of meeting a housing quota would be essential, to assure its practicality and feasibility, plus the commitment of the city or town to realize the plan, and particularly the manner in which sites are chosen so as not to pre-determine new segregated housing patterns within the locality. The proposed amendments included a requirement for certification of any such plan by the State Commissioner of Community Affairs, who would be responsible for carrying out just such a review.

Conclusion: The Challenges at Hand

The Massachusetts Zoning Appeals Law provides no model text for nation-wide use. What it does provide is the first real case history of a special permit process sanctioned by the state and responding to state-level interests, and to our knowledge the only such process yet in existence in this country. The case law that is being developed in Massachusetts should prove invaluable in sharpening the language of what may soon become the new national model act, the model land development code being prepared by the American Law Institute.

If the means can be found to cope with the five major issues outlined in this paper, then the law stands a good chance of becoming a cornerstone of both housing and land use programs of the Commonwealth of Massachusetts. However, several rudimentary housekeeping functions will also need more support than they are now getting from the State. A state-appropriated budget will be needed. This, in turn, should make possible a more intensive hearing schedule for members of the Housing Appeals Committee, by paying them for their time. A heavier flow of information to local officials, particularly the zoning boards of appeals, is also needed to keep them abreast of the experiences of other communities and developers in the comprehensive permit process, and particularly the findings of the courts as they are handed down. Some standard reference is needed for establishing the levels of "regional need for low and moderate income housing" in each part of the state, which should be realized in the findings from the 1970 Census of Housing now being developed by the Department of Community Affairs, with the data broken down by household types and incomes. The bases for other standards mentioned by the Law, such as "health and safety", and preservation of "open spaces", also need to be specified in greater detail by administrative rules of the Commissioner of Community Affairs whether or not he is directed by the new legislation to extend the

scope of his rules this far. Should these specifications become issues in court tests, the Housing Appeals Committee could find the standards established for it by the courts if the Commissioner of Community Affairs does not proceed soon to preempt this field by an extension of his own administrative rules.[19]

The issues of zoning authority and incentives for local housing plans have already been attacked in corrective amendments to the Zoning Appeals Act filed in 1972 both by the Department and by the Massachusetts Law Reform Institute, which had coordinated their preparation.[20] The amendments would also rectify a number of problems peculiar to the text of the Massachusetts law that have surfaced in its administration, such as its inadvertent exclusion of "turnkey" housing developments and the ambiguities of its standards for reasonableness. But the legislative leaders do not appear ready to overhaul the Zoning Appeals Act for its own sake, and the bill died in the Senate Ways and Means Committee. The opinion expressed the year before by a state representative, not to be mentioned, seems to typify the legislative sentiments: "We passed Chapter 774 in 1969 to get us off the hook on the housing issue, and still find it useful for that. But don't ask us to give you any more powers to make it work!"

Improvements may result sooner as amendments to the basic state zoning enabling statute, which presently bears no relation to the four sections of the regional planning statute that comprise the Zoning Appeals Law. The Boston Bar Association in both the 1970 and 1971 filed legislation that would provide for special zoning permits for low and moderate income housing to be issued by the board of appeals, and for appeal of denials either to the courts or to the Housing Appeals Committee, but only in cities or towns where the state finds the present zoning ordinance to unduly restrict the development of such housing.[21] Issuance of permits in this manner should be more agreeable to the local officials, and if so would avoid most of the major issues raised in this paper. The bill failed to pass either year, but a general recodification of the zoning enabling statute is currently before a legislative study committee, and may yet move in this direction.

Perhaps the greatest promise of the Zoning Appeals Law is an eventual role for the state not just in approval of public purpose housing developments but in many broader aspects of public land use policies as well. Few state governments have found courage or resources to grasp the nettle of state land use policy and its implementation through all state programs that establish interests in the land. The American Law Institute is showing the way toward engagement of local zoning in this endeavor. Passage of the substantial Federal assistance program for state land use planning, now before Congress, may provide the incentives for state leadership on a scale that might at last be called "planning for the open society."

NOTES TO THE TEXT

1. For the full text of Chapter 774 of the Acts of 1969 of the Massachusetts legislature, referred to here as the "Massachusetts Zoning Appeals Law," see Appendix A. The full title is, "AN ACT PROVIDING FOR THE CONSTRUCTION OF LOW OR MODERATE INCOME HOUSING IN CITIES AND TOWNS IN WHICH LOCAL RESTRICTIONS HAMPER SUCH CONSTRUCTION."

2. See Schneider (1970).

3. The Supreme Court of the State of Pennsylvania required a municipality to make some provision for apartment uses in Appeal of Girsh 437 PA 237, 263 A. 2nd 395 (1970). The same court overruled the local board's decision to deny a variance to construct homes on sites of less than four acres in National Land & Investment Co. v. Eastown Board of Adjustment, 419 PA. 504, 215 A. 2nd 597 (1965). The court reaffirmed this ruling with a declaration that "zoning that has exclusionary purpose or result is not acceptable in Pennsylvania..." in Appeal of Ket-Mar Builders, 439 PA. 466, 268 A. 2nd 765 (1970). For a comparison of these cases with the program in Massachusetts, see MacKay (1972), pages 4-8.

4. The Ninth Circuit Court of Appeals in California ruled in the case of the Southern Alameda Spanish Speaking Organization v. Union City, referred to as the "SASSO" ruling, that the city, despite a popular referendum to the contrary, must provide housing for low and moderate income families that are residents of the city. SASSO v. Union City, 424 F. 2nd 291 (9th Circuit, 1970).

5. The zoning category of "RH" (for Residential-Housing) was created in the zoning ordinance of Lexington, Mass., with the passage of Article 88 of the 1970 Town Warrant by the Lexington Town Meeting.

6. Interview with Maurice Corman, August 7, 1972.

7. See American Law Institute, (1970), (1971) and (1972).

8. One of the resources of the Associate Reporter for the drafts of the articles on state land development regulation and planning of the American Law Institute, in Tentative Draft No. 3, was an early analysis of the Massachusetts Zoning Appeals Act by Edmund M. See (1970).

9. See Mayne (1971), page 780.

10. This definition of regional need is spelled out in paragraph 1(g) of the "Rules and Regulations for the Conduct of Hearings by the Housing Appeals Committee," Massachusetts Department of Community Affairs, July, 1970.

11. See Massachusetts, Department of Community Affairs (Jan. 10, 1972) page 11.

12. See Massachusetts, Housing Appeals Committee (July 13, 1971) and (Nov. 19, 1971).

13. See American Law Institute (1971), Section 7-303, pgf.(1), page 26.

14. A special paragraph (3) of Section 2-301 of the model code (See American Law Institute (1970), pages 52-55) would authorize the other municipal agencies having regulatory powers over land development to delegate these to the "Land Development Agency," as a local option.

15. This analysis of the results of remanding cases back to local boards was first presented, to our knowledge, by Stoddard (1971), page 13.

16. See the text of Senate No. 1443 of 1972, Massachusetts General Court, Section 1, lines 115-128, as compared with the bills originally filed, House No. 44 and Senate No. 1064.

17. See Massachusetts, Department of Community Affairs (Jan. 10, 1972), page 28.

18. See the text of Senate No. 1443 of 1972, Massachusetts General Court, Section 1, lines 63-104. The concept of a five year period for compliance is inherent in the ratio of the total quota for land area for subsidized housing projects in a city or town to the annual quota, which is a ratio of five to one.

19. This analysis of the risks of court initiatives was first presented, to our knowledge, by Stoddard (1971), page 12.

20. The two bills containing broad corrective amendments to the Zoning Appeals Law were merged into Senate 1443 of 1972 by the Urban Affairs Committee of the legislature.

21. This legislation was originally filed on behalf of the Boston Bar Association as House 2069 of 1970. The bill was substantially expanded by its sponsors in successive re-drafts of March 24, 1970, and April 23, 1970, to provide sounder integration into the general zoning enabling statute. The legislation was filed again as House No. 1869 of 1971 but again failed to pass.

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Chap. 774. AN ACT PROVIDING FOR THE CONSTRUCTION OF LOW OR MODERATE INCOME HOUSING IN CITIES AND TOWNS IN WHICH LOCAL RESTRICTIONS HAMPER SUCH CONSTRUCTION.

Be it enacted, etc., as follows:

SECTION 1. Chapter 40B of the General Laws is hereby amended by adding the following four sections under the following caption: — LOW AND MODERATE INCOME HOUSING.

Section 20. The following words, wherever used in this section and in sections twenty-one to twenty-three, inclusive, shall, unless a different meaning clearly appears from the context, have the following meanings:—

"Low or moderate income housing", any housing subsidized by the federal or state government under any program to assist the construction of low or moderate income housing as defined in the applicable federal or state statute, whether built or operated by any public agency or any nonprofit or limited dividend organization.

"Uneconomic", any condition brought about by any single factor or combination of factors to the extent that it makes it impossible for a public agency or nonprofit organization to proceed in building or operating low or moderate income housing without financial losses, or for a limited dividend organization to proceed and still realize a reasonable return in building or operating such housing within the limitations set by the subsidizing agency of government on the size or character of the development or on the amount or nature of the subsidy or on the tenants, rentals and income permissible, and without substantially changing the rent levels and units sizes proposed by the public, nonprofit or limited dividend organizations.

"Consistent with local needs", requirements and regulations shall be considered consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces, and if such requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing. Requirements or regulations shall be consistent with local needs when imposed by a board of zoning appeals after comprehensive hearing in a city or town where (1) low or moderate income housing exists which is in excess of ten per cent of the housing units reported in the latest decennial census of the city or town or on sites comprising one and one half per cent or more of the total land area zoned for residential, commercial or industrial use or (2) the application before the board would result in the commencement of construction of such housing on sites comprising more than three tenths of one per cent of such land area or ten acres, whichever is larger, in any one calendar year; provided, however, that land area owned by the United States, the commonwealth or any political subdivision thereof, the metropolitan district commission or any public authority shall be excluded from the total land area referred to above when making such determination of consistency with local needs.

"Local Board", any town or city board of survey, board of health, board of subdivision control appeals, planning board, building inspector or the officer or board having supervision of the construction of buildings or the power of enforcing municipal building laws, or city council or board of selectmen.

Section 21. Any public agency or limited dividend or nonprofit organization proposing to build low or moderate income housing may submit to the board of appeals, established under section fourteen of chapter forty A, a single application to build such housing in lieu of separate applications to the applicable local boards. The board of appeals shall forthwith notify each such local board, as applicable, of the filing of such application by sending a copy thereof to such local boards for their recommendations and shall, within thirty days of the receipt of such application, hold a public hearing on the same. The board of appeals shall request the appearance at said hearing of such representatives of said local boards as are deemed necessary or helpful in making its decision upon such application and shall have the same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application, including but not limited to the power to attach to said permit or approval conditions and requirements with respect to height, site plan, size or shape, or building materials as are consistent with the terms of this section. The board of appeals, in making its decision on said application, shall take into consideration the recommendations of the local boards and shall have the authority to use the testimony of consultants. The provisions of section seventeen of chapter forty A shall apply to all such hearings. The board of appeals shall render a decision, based upon a majority vote of said board, within forty days after the termination of the public hearing and, if favorable to the applicant, shall forthwith issue a comprehensive permit or approval. If said hearing is not convened or a decision is not rendered within the time allowed, unless the time has been extended by mutual agreement between the board and the applicant, the application shall be deemed to have been allowed and the comprehensive permit or approval shall forthwith issue. Any person aggrieved by the issuance of a comprehensive permit or approval may appeal to the court as provided in section twenty-one of chapter forty A.

Section 22. Whenever an application filed under the provisions of section twenty-one is denied, or is granted with such conditions and requirements as to make the building or operation of such housing uneconomic, the applicant shall have the right to appeal to the housing appeals committee in the department of community affairs for a review of the same. Such appeal shall be taken within twenty days after the date of the notice of the decision by the board of appeals by filing with said committee a statement of the prior proceedings and the reasons upon which the appeal is based. The committee shall forthwith notify the board of appeals of the filing of such petition for review and the latter shall, within ten days of the receipt of such notice, transmit a copy of its decision and the reasons therefor to the committee. Such appeal shall be heard by the committee within twenty days after receipt of the applicant's statement. A stenographic record of the proceedings shall be kept and the committee shall render a written decision, based upon a majority vote, stating its findings of fact, its conclusions and the reasons therefor within thirty days after the termination of the hearing, unless such time shall have been extended by mutual agreement between the committee and the applicant. Such decision may be reviewed in the superior court in accordance with the provisions of chapter thirty A.

Section 23. The hearing by the housing appeals committee in the department of community affairs shall be limited to the issue of whether, in the case of the denial of an application, the decision of the board of appeals was unreasonable and consistent with local needs and, in the case of an approval of an application with conditions and requirements imposed, whether such conditions and requirements make the construction or operation of such housing uneconomic and whether they are consistent with local needs. If the committee finds, in the case of a denial, that the decision of the board of appeals was unreasonable and not consistent with local needs, it shall vacate such decision and shall direct the board to issue a comprehensive permit or approval to the applicant. If the committee finds, in the case of an approval with conditions and requirements imposed, that the decision of the board makes the building or operation of such housing uneconomic and is not consistent with local needs, it shall order such board to modify or remove any such condition or requirement so as to make the proposal no longer uneconomic and to issue any necessary permit or approval; provided, however, that the committee shall not issue any order that would permit the building or operation of such housing in accordance with standards less safe than the applicable building and site plan requirements of the federal Housing Administration or the Massachusetts Housing Finance Agency, whichever agency is financially assisting such housing. Decisions or conditions and requirements imposed by a board of appeals that are consistent with local needs shall not be vacated, modified or removed by the committee notwithstanding that such decisions or conditions and requirements have the effect of making the applicant's proposal uneconomic.

The housing appeals committee or the petitioner shall have the power to enforce the orders of the committee at law or in equity in the superior court. The board of appeals shall carry out the order of the hearing appeals committee within thirty days of its entry and, upon failure to do so, the order of said committee shall, for all purposes, be deemed to be the action of said board, unless the petitioner consents to a different decision or order by such board.

Section 2. Chapter 23B of the General Laws is hereby amended by inserting after section 5 the following section: —

Section 5A. There shall be within the department a housing appeals committee, consisting of three members to be appointed by the commissioner, of whom one shall be an officer or employee of the department, and two members to be appointed by the governor for terms of one year each, of whom one shall be a member of a board of selectmen and one a member of a city council or similar governing body of a city. The members shall serve for terms of one year each, and the commissioner shall designate the chairman. A member of the committee shall receive no compensation for his services, but shall be reimbursed by the commonwealth for all reasonable expenses actually and necessarily incurred in the performance of his official duties. Said committee shall hear all petitions for review filed under section twenty-two of chapter forty B, and shall conduct said hearings in accordance with rules and regulations established by the commissioner.

The department shall provide such space and clerical and other assistance as the committee may require.

Section 3. The provisions of this act are severable and, if any provision shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions. *Approved August 23, 1969.*

APPENDIX B - STATUS OF APPLICATIONS FOR COMPREHENSIVE PERMITS, JULY 31, 1971

Status of Appeals to the Massachusetts Housing Appeals Committee

City or Town	Filing Date of Appeal	Type of Developer	Type of Pop. Served	No. Of Units	Subsidy Programs Used	Starting Date of Hearing	Completion Date of Hearing	Status
Winchester	Mar.'70	limited dividend	family	66	no evidence	-	-	applicant withdrew
Billerica	May 13'70	limited dividend	family	120	no evidence	-	-	remanded to local Board of Appeals. Applicant hasn't pursued case.
Hanover	Dec.8 '70	limited dividend	elderly	88	MHFA	Mar.5'71	Jul.13 '71	local Board reversed. Court appeal.
Concord	Apr.26'71	non-profit	family	60	MHFA	Jul.28'71	Nov.19 '71	local Board reversed. Court appeal.
Newton	'71	non-profit	family	361	MHFA	Jul.19'71	-	hearing underway
Lunenburg	Aug.31'71	limited dividend	family	600	MHFA	Sep.23 '71	-	remanded to local Board of Appeals. Excess of ten percent unit quota.
Dartmouth	Oct.27'71	limited dividend	family	264	HUD, Sec. 236	Feb.14 '72	-	pending arguments
Northbridge	Nov. 5'71	limited dividend	family	192	MHFA	Dec.15 '71	-	pending final arguments
Norwood	Nov.24'71	limited dividend	family	150	MHFA	Jan.26 '72	-	hearing underway
Winchester*	Nov.24'71	limited dividend	family	90	MHFA	-	-	applicant hasn't pursued case

* See footnote on third page of this appendix.

Status of Appeals to the Massachusetts Housing Appeals Committee (Cont.)

City or Town	Filing Date of Appeal	Type of Developer	Type of Pop. Served	No. Of Units	Subsidy Programs Used	Starting Date of Hearing	Completion Date of Hearing	Status
Barnstable	Dec.28'71	limited dividend	family	300	MHFA	Feb. 7 '72	-	applicant withdrew
Attleboro	Jan. 4'72	limited dividend	family	200	no evidence	Jan.21 '72	-	appeal dismissed
Chelmsford	Feb.25'72	limited dividend	family	450	MHFA	Apr.18 '72	-	hearing underway
Bridgewater	Apr.18'72	limited dividend	family	100	MHFA	May 11 '72	-	suspended
Rockland	May 2 '72	limited dividend	family	304	no evidence	May 22 '72	-	halted temporarily at request of developer's counsel.
Woburn	May 5'72	limited dividend	family	132	no evidence	Jun.22 '72	-	hearing underway
Gardner	May 30'72	non-profit	family	151	HUD - 236 co-op	Jun.19 '72	-	pending final argument
Waltham	Jun.12'72	Housing Authority	family	24	State 705	Jul.24 '72	-	hearing underway
Bedford	Jun.30'72	limited dividend	family	96	MHFA	Aug. 2 '72	-	hearing scheduled

APPENDIX B (CONT.)

Status of Developments Granted Comprehensive Permits by Local Zoning Boards of Appeals*

City or Town	Date of Hearing	Type of Developer	Type of Pop.Served	No. of Units	Subsidy Program Used	Date of Permit	Status
Woburn	5/13/70	Hsing.Auth.	elderly	116	State Pub. Housing	6/18/70	Under construction
Winchester *		Limited Div.		90		10/ /71	Court Appeal
Dennis		Hsing.Auth.	elderly	48	State Pub. Housing		Under construction
Weymouth	3/22/72	Non-Profit	elderly	200	MHFA or FHA	4/18/72	
Winchester		Limited Div.		100±			Court Appeal

*An Appeal for a state-directed permit for the 90-unit project from Winchester was submitted to the Housing Appeals Committee even though it had been granted locally, to seek a more favorable posture in the courts. Therefore, this development appears on both lists.

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The Massachusetts Zoning
Appeals Law. 1972.
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